IB 97-142

EMBASSY OF JAPAN
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July 9, 1997

William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

Dear Mr. Caton:

I refer to the Federal Communications Commission's Notice of Proposed Rulemaking adopted on June 4, 1997. Please find attached the Japanese Comments on the Rules and Policies on Foreign Participation in the U.S. Telecommunications Market proposed by the Federal Communications Commission. I would be very grateful if you would take our comments fully into consideration.

Sincerely,

Junichiro Miyazaki
Junichiro Miyazaki
Counselor of Embassy of Japan

Attachments:

Additional Comments on the Rules and Policies on Foreign Participation in the U.S. Telecommunications Market proposed by the Federal Communications Commission

cc: Mr. William Corbett, Office of U.S. Trade Representative

Mr. Richard Beaird, U.S. Department of State

Comments on the Rules and Policies on Foreign Participation in the U.S. Telecommunications Market Proposed by the Federal Communications Commission

The Government of Japan (GOJ) hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"(IB Docket No.97-142)). The comments are not exhaustive and the GOJ may submit additional points in the future, as appropriate.

1. The GOJ welcomes the FCC's proposal to revise its rules and policies on foreign participation in the U.S. Telecommunications Market to implement the Basic Telecom Agreement under the auspices of the World Trade Organization (WTO). Especially, the proposal in the NPRM that the FCC will not apply a reciprocal test of the "effective competitive opportunities" (ECO) test for carriers from WTO Member countries is in line with what the GOJ has requested.

However, the GOJ still has serious concerns with regard to the proposed NPRM, and requests the FCC to amend its rules in response to the following comments of the GOJ.

2. The GOJ believes it most important that the reciprocal market entry examination, which is inconsistent with the General Agreement on Trade in Services (GATS) principles, will be abrogated completely and that transparency of rules will be fully ensured.

3. With regard to Section 214 entry standard and Section 310 standard for foreign ownership of radio licenses of the Communications Act indicated in the NPRM, the FCC presumes that applications filed by carriers of WTO Member countries meet the "public interest". However, the FCC retains authority to rebut the presumption and deny the applications for reasons of "public interest" (paragraph 43) and a "very high risk to competition" (paragraph 32). This could in turn give rise to serious problems from the viewpoint of transparency and consistency with the GATS.

Specifically, detailed criteria regarding the "public interest" and the "very

high risk to competition" are not made clear in the NPRM. This means that there is large room for the FCC to exercise substantially discretionary power when implementing its rules and that they lack transparency.

In addition, "foreign policy" and "trade concerns" are listed to be considered as "public interest" factors in the NPRM. Considering the case of Section 214 applications by NTTA Communications and KDD America, the GOJ is deeply concerned that it is still possible for the FCC to deny applications for situations that have nothing to do with the applications, and to operate rules in a way that is inconsistent with the GATS principles and the commitments of the Government of the United States(USG). under the WTO Basic Telecom Agreement. Therefore, the GOJ requests that the FCC abolish such factors as "foreign policy" and "trade concerns."

4. The GOJ has similar concerns about the application of the FCC's Flexibility Order. According to the NPRM, it will be possible in principle to make alternative settlement arrangements replacing international settlement rates between a U.S. carrier and a foreign carrier from WTO countries, but the FCC can still deny making the arrangements if "market conditions in the country in question are not sufficiently competitive to prevent a carrier with market power in that country from discriminating against U.S. carriers" (paragraph 151). This leaves the FCC much room for discretion and will give rise to concerns about unjustifiable operation, inconsistent with the GATS principles. Therefore, the GOJ requests that the FCC ensure transparency of its rules and abolish such reciprocity completely.

5. The USG is committed to allowing up to 100% indirect foreign ownership of a common carrier radio license under the WTO Basic Telecom Agreement. Given this, the GOJ believes that changing only the interpretation of "public interest" without making any amendment to Section 310(b)(4) of the Communications Act which stipulates regulations concerning more than 25% indirect foreign ownership of a common carrier radio license, will not ensure the full and effective implementation of the commitments of the USG under the WTO Basic Telecom Agreement.

6. With regard to the safeguard measures against dominant carriers (paragraph

82), how the measures are to be applied is unclear and can be decided mainly at the discretion of the FCC. Given that criteria for determining carriers as dominant are not spelled out in detail and the safeguards imposed on foreign-affiliated carriers are different from those imposed on U.S. carriers with market power on the U.S. end of a route, the GOJ is concerned that the measures might be used to discriminate unfairly against foreign-affiliated carriers.

Since WTO Member countries have made commitments to undertaking measures to liberalize their markets and introducing safeguard measures to prevent anticompetitive practices under the WTO Basic Telecom Agreement, it is unnecessarily burdensome and could be inconsistent with the GATS principles, to impose the supplemental safeguards in addition to the basic safeguards on a carrier that is affiliated with a carrier from a WTO Member country that has market power and does not face competition in the country.

7. With regard to "structural separation between the U.S. carrier and its affiliated foreign carrier"(paragraph 111-113), there is a concern that it could be inconsistent with GATS Article 16 if direct or indirect investments are restricted.

8. Moreover, although this NPRM might have been intended to implement the WTO Basic Telecom Agreement, it is regrettable that the period of time normally required to reach a decision concerning an application for a license is not defined in the NPRM. The GOJ requests that the period be established promptly, as required by the Reference Paper on regulatory principles and enshrined in Article 6 of the GATS, before the Agreement comes into effect. In addition, it should be extensive enough to deal with cases in which opposing comments are made concerning the application.

9. Also, it is proposed in the NPRM that the same benchmark settlement rate conditions be applied to the certification under Section 214 for U.S. facilities-based private line carriers, as proposed in the FCC Benchmarks Notice applied to U.S. private line resale-based carriers (paragraph 121). This, however, is inappropriate, because the GOJ believes, as stated in its comments in February, it is problematic to adopt the benchmark settlement rate conditions in order to grant certification under

Section 214.

10. With a view to benefiting fully from the achievements of the WTO Basic Telecom Agreement and promoting worldwide liberalization in the telecommunications markets, the GOJ requests that the FCC amend its rules in line with the GOJ's comments.

Also, since the rules that the FCC has proposed so far, including the ECO-Sat test and the Benchmarks concerning international settlements rates, seem inconsistent with the GATS, the GOJ requests that the FCC modify the rules quickly in response to the comments that the GOJ has already submitted to the FCC.

(END)